Supreme Court, U.S.
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No. 07-368

IN THE

Supreme Court of the United States

COOSEMANS SPECIALTIES, INC.; PETITIONER

v.

DEPARTMENT OF AGRICULTURE;
UNITED STATES OF AMERICA AND
EDDY C. CRECES; DANIEL F. COOSEMANS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN P. MCCARRON
Counsel of Record

McCarron & Diess
4900 Massachusetts Ave, N.W.
Washington, D.C. 20008
(202) 364-0400

Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether §499b(4) of the Perishable Agricultural Commodities Act ("PACA") allows the U.S. Department of Agriculture ("USDA") to revoke the PACA license of a produce merchant based on undercover activities promoted by the government in a criminal investigation to end a long-running criminal conspiracy in a produce inspection service established by USDA under §499n(a) of PACA.

2. Whether §558(c) of the Administrative Procedures Act (APA), 5 U.S.C. §558(c), allows USDA to revoke a PACA license without notice of the prohibited conduct and an opportunity to cure.

RULE 29.6

Petitioner is Coosemans Specialties, Inc., a New York Corporation, which has no parents, subsidiaries or affiliates that have issued shares or debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

Coosemans Specialties, Inc. ("Coosemans") petitions for a writ of certiorari to review an opinion and judgment of the U.S. Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia, dated April 6, 2007, is officially reported at *Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, and is reproduced at App. 1a-17a.

The opinion of USDA's Judicial Officer, the final agency authority, is reproduced at App. 20a-71a. The opinion of USDA's Administrative Law Judge ("ALJ") is reproduced at App. 72a-93a.

JURISDICTION

The petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days from denial of a petition for rehearing on June 20, 2007. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions involved are 5 U.S.C. §558(c) of the Administrative Procedures Act; and 7 U.S.C. §499b, §499c(a), §499h(a) and §499n(a) of the Perishable Agricultural Commodities Act ("PACA"). The relevant statutory provisions are reproduced below.

Section 558(c) of the APA (5 U.S.C. §558(c))

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and compl[illegible] proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given –

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Section 2(4) of the PACA (7 U.S.C. §499b)

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive

practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such

transaction; or to fail to maintain the trust as required under section 499e (c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated - (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant; and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have

knowledge of the violation or lacked the ability to correct the violation.

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

Section 8(a) of the PACA (7 U.S.C. §499h(a))

(a) Whenever (1) the Secretary determines, as provided in section [499f] of this [title], that any commission merchant, dealer, or broker has violated any of the provisions of section [499b] of this [title], or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section [499n(b)] of this [title], the Secretary may

publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Section 14 of the PACA (7 U.S.C. §499n(a))

(a) The Secretary is authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this Act, to any interested person the class, quality, and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to cover the cost for the service rendered: Provided, That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the term of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: Provided further, That

expenses for travel and subsistence incurred by inspectors shall be paid by the applicant for inspection to the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this Act: And provided further, That official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this Act, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. 1 et seq.), as prima-facie evidence of the truth of the statements therein contained.

(b) Issuance of fraudulent certificates; penalties Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

STATEMENT

This case arises out of an interpretation of the PACA which regulates the wholesale produce industry in the United States. The Act requires every merchant, who buys or sells wholesale quantities of produce, to obtain a license. 7 U.S.C. §499c(a). The Act also prohibits specific conduct by produce merchants at §499b. In addition, as a service to produce merchants, Congress authorized USDA to employ inspectors to inspect the quality and condition of any lot of produce shipped in interstate or foreign commerce in §499n(a) of PACA. Pursuant to that authority, USDA established an inspection service.

The largest inspection office, located in New York City, was the center of "rampant corruption that existed for years, if not decades in the inspection service at the Hunts Point Terminal Produce Market in the Bronx, NY." *G&T Terminal Packaging v. Dep't of Agri.*, 468 F.3d 86, 89 (2d Cir. 2006). In a case arising out of the same conspiracy, the Second Circuit described the produce inspectors' criminal enterprise as follows:

> It is undisputed that many of the produce inspectors hired by the Department of Agriculture to provide impartial assessments of the condition of agricultural commodities arriving at Hunts Point for distribution throughout the metropolitan New York City area, far from acting as honest brokers, regularly accepted, and often demanded, cash payments from the merchants they were supposed to serve. When they did not receive payments from a merchant, the unscrupulous inspectors often would delay the performance of their duties or intentionally skew the results of their

> inspections in a manner calculated to harm the bottom line of the non-compliant merchant. In contrast, these inspectors gave preferential treatment to the merchants who crossed their palms with silver, quickly responding to their requests for inspections and, at least in some cases, shading the outcomes of their inspections in favor of merchants who agreed to pay. *G&T Terminal Packaging v. Dep't of Agri.*, at 87-88.

In an effort to achieve an honest inspection service under §499n(a), the government initiated a covert criminal investigation in the late 1990s at the New York City produce market, designated "Operation Forbidden Fruit." The investigation culminated in 1999 with the arrest of William Cashin, one of the corrupt inspectors, who began cooperating with the F.B.I. App. 33a-34a. At the direction of the F.B.I., Cashin solicited and obtained cash payments from merchants, as a condition of performing inspections, while wearing a recording device and secretly taping conversations. *Id.* One such merchant was Joe Faraci, an officer and shareholder of Coosemans, who made payments solicited by Cashin to perform 14 inspections. App. 35a-36a. Faraci was later charged with criminal offenses in the United States District Court for the Southern District of New York, and pled guilty to one (1) count of bribery of a public official. App. 36a-37a.

Coosemans is in the business of buying and selling wholesale quantities of produce, and requires a PACA license to engage in such commercial activity. After the conclusion of Faraci's criminal case, the agency filed a license revocation action against Coosemans based only on the particular payments solicited from Faraci by

Cashin as an undercover agent working to end the criminal conspiracy in the inspection service.

Coosemans contended that Congress did not intend that PACA regulate such conduct of licensees secretly encouraged by the government to root out a long-running criminal enterprise in USDA's own inspection service. Coosemans also contended it was entitled to notice of the prohibited conduct and an opportunity to achieve compliance under §558(c) of the Administrative Procedures Act (APA), 5 U.S.C. §558(c), before USDA could revoke its license, and that it had not received such notice and opportunity.

A hearing was held before an Administrative Law Judge ("ALJ"), who decided the payments to undercover agent Cashin were violations of §499b(4) of PACA because Coosemans "fail(ed), without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with (a produce) transaction." App. 85a-86a. The ALJ decided that the violations consisted of failing to perform a new "implied duty" of informing the particular produce sellers of the inspected produce each time a payment was made to undercover agent Cashin (App. 86a), though the government obviously did not inform Coosemans of this new duty while it carried out its undercover investigation of the inspection service. The ALJ revoked the PACA license of Coosemans. App. 87a.

On appeal, the Judicial Officer, the final agency authority, affirmed the ALJ's decision. The Judicial Officer adopted the ALJ's conclusion that Coosemans had a new "implied duty" under PACA to inform sellers of the payments made to undercover agent Cashin. App. 47a. In addition, the Judicial Officer held there was a duty not to pay produce inspectors under PACA because such payments "will or could undermine the trust sellers

place in the accuracy of USDA inspection certificates and the integrity of USDA produce inspectors." App. 54a-55a. The Judicial Officer also decided Faraci's payments to Cashin were intentional, and therefore "willful" under §558(c) of the APA, allowing USDA to dispense with notice to Coosemans before revoking its license.

On a petition for review to the U.S. Court of Appeals for the D.C. Circuit, the circuit court denied review holding that under *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the "implied duty" clause of PACA was ambiguous, thereby allowing the agency to regulate this conduct under PACA, and that USDA's regulation in this case was a reasonable interpretation of PACA. The D.C. Circuit further held that Coosemans was not entitled to prior notice and an opportunity to cure under section §558(c) because the conduct was careless disregard of the requirements of PACA, and hence "willful."

REASONS FOR GRANTING THE PETITION

I. GOVERNMENT PROMOTED CONDUCT IN A CRIMINAL INVESTIGATION TO ACHIEVE AN HONEST INSPECTION SERVICE UNDER §499n(a) OF PACA IS NOT REGULATED UNDER §499b(4) OF PACA.

The threshold question under *Chevron* is whether, based on the words of the statute, Congress intended an agency to regulate the conduct at issue. In this case the question is whether Congress intended USDA to discipline licensees under §499b(4) of PACA for conduct covertly initiated and encouraged by the F.B.I. to root out a criminal conspiracy in the government inspection

service so as to achieve an honest inspection service under §499n(a). *Chevron*, 467 U.S. at 842.

In making the threshold determination under *Chevron*, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, (2000). Rather, "the meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context . . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.*, at 132-133, (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). To determine whether the authority to regulate this conduct has been delegated to USDA, *Chevron* requires courts "exhaust the 'traditional tools of statutory construction,'" in reviewing the words of the statute. *Chevron*, 467 U.S. at 843 n.9. In addition to reviewing the particular language of the statute at issue, an analysis under *Chevron* requires examination of the pertinent words in the context of the overall statutory scheme. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This means interpreting the statute "as a symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *FDA v. Brown & Williamson Tobacco Corp.*, *supra*. The whole law, its object and policy must be considered. *Regions Hospital v. Shalala*, 522 U.S. 448, 460 n.5 (1998).

The D.C. Circuit's threshold analysis under *Chevron*, focuses solely on the word "any" in the clause, "fail, without reasonable cause, to perform *any* specification or duty, express or implied, arising out of *any* undertaking in connection with *any* such transaction." (Emphases added.) App. 7a. Based solely on that word, the D.C. Circuit concludes the "implied duty" clause in §499b(4) is

ambiguous, and that Congress intended USDA to discipline licensees under §499b(4) for conduct encouraged by government agents (the F.B.I.), to end the criminal conspiracy in the government produce inspection service, which Congress authorized under §499n(a) to assist produce merchants.

The D.C. Circuit's brief Step One analysis merely elaborates the theme that the word "any" in the relevant clause allows the widest latitude in regulating conduct under the PACA. Thus, the D.C. Circuit says this language is "extremely broad," as the word "any" appears "no fewer than three times in the specific clause at issue." *Id.* Next, the D.C. Circuit states that "[t]he breadth and ambiguity of (this) key phrase . . . contemplates a wide range of behavior." For this proposition, the D.C. Circuit cites *G&T Terminal Packaging Co.* at 96, and one of the agency's own regulations at 7 C.F.R. §46.26, which states, "it is impractical to specify in detail all of the duties (governing licensees)" in the regulations. *Id.*

In the *G&T Terminal Packaging* case, the Second Circuit failed to perform any analysis of the statute under Step One of *Chevron.* Instead, the Second Circuit merely stated that it was clear Congress had not spoken to the precise issue in question, and moved on to Step Two. *Id.* at 96. But it is improper to proceed to Step Two merely because the statute does not specifically prohibit an agency from regulating specific conduct. As the D.C. Circuit has explained, "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994). Without a Step One analysis,

the *G&T Terminal Packaging* case is not authority for the proposition that USDA was given authority under PACA to regulate this conduct.

Similarly, the citation to a USDA regulation, which states it is impractical to specify in the regulations all duties governing licensees, does not advance the ball. It may well be impractical to specify all duties, but that does not answer the question whether the statute authorizes USDA to regulate the particular conduct in question under PACA.

The D.C. Circuit then states that "implied duties" are given meaning by agency gap-filling, citing its own decision in *JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 614 n.8 (D.C. Cir. 2001), which states there is "substantial ambiguity in §499b(4)," and that it is the agency's function to define offenses under that provision. *Id.* Such a conclusory statement again avoids the statutory analysis required under *Chevron.*

The D.C. Circuit also cites *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), for the proposition that an agency should be accorded *Chevron* deference, "as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Id.* In *Aguirre*, this Court held the INS had authority to apply an existing statutory standard to a particular set of facts. Thus, the question in *Aguirre* was whether violent acts of property destruction by an alien were "serious nonpolitical crimes," an existing statutory standard, as the agency had determined. In *Aguirre*, the standard was clear, and the agency merely determined the crimes in question fit within that standard. In contrast, in this case USDA created a new statutory standard. Thus, this case is more akin to *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), where this Court decided the agency had

improperly interpreted the statute by creating an incorrect standard to judge the conduct at issue.

Finally, the D.C. Circuit again cites the *G&T Terminal Packaging* case for the proposition that "the expansiveness (of the implied duty clause) suggests that Congress intended to grant the Secretary broad leeway to address the infinite variety of facts and circumstances that might surround a PACA violation." *Id.* at 565. Again, this is a conclusory statement which fails to analyze the statute to determine if there is any indication that Congress intended USDA to revoke a merchant's PACA license under these circumstances.

Based on this cursory review, the D.C. Circuit held that the statute is ambiguous, thereby allowing the agency *carte blanche* in regulating an "infinite variety" of conduct of produce merchants. But the D.C. Circuit's analysis has no factual or statutory context, and without such a context, every word in a statute is ambiguous. *Brown v. Gardner*, 513 U.S. at 118 ("Ambiguity is a creature not of definitional possibilities but of statutory context.") A contextual analysis of the facts of the case and the wording of the statute demonstrates that §499b(4) of PACA does not regulate the conduct in question.

A review under *Chevron* begins with the agency's interpretation of the statute. In this case, the agency decided there were violations of the "implied duty" clause of §499b(4) by failing to notify the sellers of the payments to undercover agent Cashin (App. 47a), or by failing to refrain from making the payments which undermines sellers' trust in the inspection service. App. 55a. But there is nothing in PACA indicating that a merchant, who is unwittingly being used by the government in a covert criminal investigation to end a conspiracy in a large part of the §499n(a) produce inspection service, has

such duties under §499b(4). On the contrary, PACA directs USDA to establish an inspection service and employ federal inspectors under §499n(a). Under PACA, produce merchants have no control over inspections or the inspectors employed by USDA. Thus, PACA requires USDA and its employees to be responsible for notifying sellers that their inspectors are soliciting and receiving cash payments for performing inspections, and for maintaining sellers' trust in the accuracy of inspections and the integrity of the inspection service. Indeed, the investigation was to accomplish the purpose of §499n(a) and reestablish an inspection service with integrity.

There are a number of provisions in PACA proscribing particular conduct by merchants in connection with inspections. Congress criminalized the making or uttering of fraudulent inspections certificates at §499n of the PACA. In addition, Congress prohibits specific conduct involving inspections under §499b. Thus, it is unlawful for a licensee to remove any "card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing a perishable agricultural commodity, if (it) contains a certificate or statement under authority of any Federal or State inspector ... as to grade or quality of the commodity ..." 7 U.S.C. §499b (6). It is also unlawful for a licensee, "without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, ..." 7 U.S.C. §499(b)(7). These are precise prohibitions about what a licensee may not do in connection with an inspection of a load of produce by a federal inspector. If Congress intended USDA to regulate the conduct in this case under PACA, one would

expect a particular prohibition against such conduct in either §499b or §499n. The D.C. Circuit did not review any of these statutory provisions in relation to the particular conduct in question, as required under *Chevron*.

The D.C. Circuit also fails to review the relevant conduct in relation to the duties of produce merchants set out in §499b of PACA, to determine if the conduct falls within the range of duties in §499b. *Cf. Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003). A review of those duties shows that each regulates specific commercial activities by one merchant towards another. Thus, §499b requires a merchant not to: deceive another merchant about quantities of produce (¶ 1); reject another merchant's produce or fail to deliver produce to another merchant without reasonable cause (¶ 2); dump another merchant's produce without reasonable cause (¶ 3); make false statements to another merchant in connection with a produce sale, or fail to account or pay for produce received from another merchant, or fail to perform any express or implied duty arising out of any undertaking in connection with a transaction (the clause in question in this case), or fail to maintain the PACA trust on behalf of another merchant (¶ 4); misbrand produce sold to another merchant (¶ 5); remove any notice on a carrier regarding grade, quality or origin to be shipped to another merchant (¶ 6); or substitute produce sold to another merchant after it has been inspected (¶ 7). These are particularized duties of one produce merchant towards another produce merchant. Refusing to pay produce inspectors required by corrupt produce inspectors to perform inspections, or notifying sellers of such payments, does not fit within the kinds of activities prohibited in §499b, especially when USDA is charged

with establishing and maintaining an honest inspection service under §499n(a).

The D.C. Circuit explained that prohibiting the conduct at issue protects producers and other merchants from dishonest and irresponsible conduct. App. 8a. But the purpose of the criminal investigation was to protect produce merchants from the dishonest and irresponsible conduct of a corrupt inspection agency that was supposed to serve the merchants rather than extort money from them. The conduct by Faraci was part of that effort which was initiated by the government to achieve its ultimate aim of cleaning up the inspection service. Furthermore, there was no allegation or evidence that the payments solicited by and paid to undercover agent Cashin in this case had anything to do with improper behavior towards another merchant. There was no evidence Coosemans sent any of the relevant inspections to the sellers, or obtained any pricing adjustments based on the inspections. The words of §499b require the actual existence of unfair or dishonest conduct toward another merchant, not the possibility that unfair conduct may result.

Prior D.C. Circuit cases interpreting the "implied duty" clause of §499b(4) further illustrate this point. The D.C. Circuit notes that the PACA cases closest on point are those involving commercial bribery. These are *JSG Trading Corp. v. USDA*, 176 F.3d 536 (D.C. Cir. 1999), subsequent appeal, *JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608 (D.C. Cir. 2001), cert denied, 534 U.S. 992 (2001), and *Sid Goodman & Co., Inc.*, 49 Agric. Dec. 1169, 1183-84 (1990), aff'd, 945 F.2d 398 (4th Cir. 1991), cert denied, 503 U.S. 970 (1992). In these cases, sellers surreptitiously made payments to employees of buyers, without the knowledge of the buyers, to induce the employees to continue to buy produce from the seller.

The agency determined this conduct violated the implied duty clause of §499b(4), and its decision was affirmed by the D.C. Circuit. However, the conduct being regulated in the commercial bribery cases was actual fraud on the buying produce merchant by failing to disclose the payment to the buyer's agent. Similarly in the *The Produce Place v. USDA*, 91 F.3d 173 (D.C. Cir. 1996), cited by the D.C. Circuit, a buyer was found to have violated §499b(4) by sending a false inspection report to another merchant. See also, *Harry Klein Produce Corp. v. USDA*, 831 F.2d 403, 405 (2d Cir. 1987); *Finer Foods Sales Co., Inc. v. USDA*, 708 F.2d 774, 782 (D.C. Cir. 1983); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), which are other cases under §499b governing actual nonpayment or fraudulent conduct towards other merchants. Here, as noted, there was no conduct towards another merchant.

When the facts of this case are analyzed in the context of the government's role in the relevant conduct, and the language of the statue and its purpose, the conduct in question is not regulated under §499b(4) of PACA.

Step Two of *Chevron* arises only if the court finds that the matter has been delegated to the agency under the statute, and the statute is silent or ambiguous with respect to the specific issue. In other words, Step Two asks if the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design. USDA's interpretation of the "implied duty" clause of §499b(4) in these circumstances does not fill a gap in a reasonable way in light of the design of PACA.

There is no indication in PACA that produce merchants are the guardians of the inspection service. PACA places that responsibility squarely on USDA. The government properly moved to end the corrupt practices

of the inspectors. Thus, there is no gap in the statute to be filled by imposing these new duties on Coosemans based on the conduct during the undercover investigation.

In addition, the government did not want or expect Coosemans to fulfill these unknown duties during the investigation. The "failure to notify" duty would have required Coosemans to notify each seller of the produce being inspected that cash payments were being made to Cashin. The last thing the government wanted was for Coosemans to notify sellers of the payments to undercover agent Cashin during the investigation. Such notice would have sabotaged Cashin's usefulness and the success of the investigation, thereby thwarting the goal of PACA to have an honest inspection service. If there really were such a duty to notify during the investigation, then the government had an obligation to advise Coosemans of this new duty. Indeed, it must be presumed the government would have notified Coosemans of this duty if it applied, and would not have kept it secret, as it did, to later spring a trap on Coosemans. The government did not notify Coosemans of this duty because it did not think such duty applied in the context of an undercover inspection to end a corrupt inspection service. Imposing such a duty on Coosemans in these circumstances after the fact is not a reasonable way to fill a gap in the statute.

Similarly, as to the second new duty -- failure to refrain from paying inspectors -- the government also did not believe this duty applied under the circumstances. If it had, the government certainly was required to and would have advised Coosemans of this new obligation under PACA. Again, for the reasons explained above, it did not do so because the government did not intend for this duty to apply in these

circumstances in order to achieve its purpose of an honest inspection service under §499n(a). As with the duty to notify, it is not reasonable for USDA to fill a gap in the statute with a Catch 22 in which the government secretly initiates conduct by a produce merchant to achieve the goal of an honest inspection service, and then later disciplines a licensee under another section of the statute for engaging in the very conduct it encouraged to achieve that goal.

In sum, under Step One of *Chevron*, the conduct in question is not regulated under §499b(4) of PACA. And under Step Two, the agency's reading does not fill a gap or define a term in PACA in a reasonable way in light of the purpose of PACA to maintain a fair and reliable inspection service.

II. USDA AND THE D.C. CIRCUIT NULLIFY THE DUE PROCESS NOTICE UNDER THE APA, 5 U.S.C. §558(c).

Due process for administrative proceedings is codified at 5 U.S.C. §558(c). This due process clause is as fundamental as the one in the Constitution since administrative agencies have the same power to deny liberty and property rights as the other branches of government. Interestingly, it appears this Court has never reviewed this crucial administrative law provision. As explained below, the decisions by USDA and the D.C. Circuit in this case effectively turn this clause into a dead letter, allowing deprivations of property and liberty by administrative agencies without prior notice of newly created standards.

After the conduct at issue, USDA advised Coosemans that it had new duties under the "implied duty" clause of §499b(4) of the PACA.[1] These new duties require licensees to refrain from making direct cash payments to corrupt USDA inspectors, or, if such payments are made, to notify sellers of this fact. App. 47a, 55a. As explained above, these new duties were applied to conduct that occurred in a covert government investigation to end a criminal conspiracy in USDA's produce inspection service. Thus, the government purposefully did not advise Coosemans of these new duties. Only after the investigation was concluded, did USDA advise Coosemans that the very conduct secretly encouraged by the government was prohibited under PACA, and merited revocation of Coosemans' PACA license.

The Judicial Officer correctly noted that §558(c) states that notice need not be given in the case of "willfulness." App. 56a-57a. The Judicial Officer explained there is a two-prong test for willfulness under §558(c): either intentional violation of the statute, or careless disregard of statutory requirements. The Judicial Officer stated, "A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute." App. 57a. (Citations omitted.) The Judicial Officer

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[1] In his opinion, the Judicial Officer states he has consistently interpreted §499b(4) to prohibit payment of unlawful gratuities and bribes to USDA produce inspectors. App. 55a. However, the Judicial Officer only cites other cases arising out of "Operation Forbidden Fruit," and these are, in fact, the only cases that have held there is such a prohibition. App. 66a-67a. These cases arose and were decided well after Faraci's payments to Cashin in this case.

decided the first prong of this test had been satisfied because, "The record clearly establishes that Joe Faraci intentionally made unlawful payments to William Cashin in connection with produce inspections, and thereby acted willfully." *Id.* This conclusion dispenses with any need for prior notice of prohibited acts. Instead, a person need only act intentionally, and USDA can decide later if the act is a violation of the statute. This interpretation requires no notice whatsoever, and cuts the §558(c) notice requirement off at the knees.

Apparently, the D.C. Circuit recognized the problem with the Judicial Officer's interpretation, for it took another tack in deciding the issue. It decided the conduct was willful under the second prong of the §558(c) test for "willfulness" because, "Faraci acted with at least careless disregard of the implied duty clause (of PACA)." App. 14a. The D.C. Circuit then stated prior cases put Coosemans on notice that such conduct was a violation of PACA. Thus, the D.C. Circuit conceded that a §558(c) notice was required. However, in an elliptical citation, the D.C. Circuit noted only one prior case that gave Coosemans notice under §558(c) as follows: "*Cf. JSG Trading Corp. v Dep't of Agric.*, 235 F.3d at 617 (concluding that the Secretary's revocation of a PACA license in commercial bribery cases provided 'ample notice that commercial bribes may result in revocation')." As explained below, prior notice of commercial bribery under PACA cannot reasonably be interpreted as providing notice of the prohibited conduct in question under §558(c).

In *JSG Trading Corp. v. Dep't of Agric.*, 176 F.3d 536 (D.C. Cir. 1999) (*JSG Trading I*), the D.C. Circuit reviewed the Judicial Officer's decision to revoke a PACA license for commercial bribery. In *JSG Trading I*, the D.C. Circuit carefully defined "commercial bribery"

as involving the offer of consideration to an employee of a company to continue to have the company do business with the briber's company. The D.C. Circuit also cited a treatise, state statutes and Black's Law Dictionary, in specifically defining the offense of "commercial bribery". *JSG Trading I* at 542-543. The D.C. Circuit then remanded the case to the agency for further consideration because the agency's per se standard for "commercial bribery" eliminated the usual elements of secrecy and intent to induce in commercial bribery law, and deviated from the agency's prior commercial bribery decisions. *Id.* at 543-544.

On remand, the Judicial Officer revised the standard for determining commercial bribery, and again revoked the license of JSG Trading. On review to the D.C. Circuit, there was a second opinion in *JSG Trading II*, in which the D.C. Circuit affirmed the agency's revised interpretation of "commercial bribery." In so doing, the D.C. Circuit denied the petitioner's challenge in *JSG Trading II* for lack of notice under §558(c), on the basis that prior commercial bribery cases of *In re Sid Goodman & Co.*, 49 Agric. Dec. 1168 (1990), aff'd, 945 F.2d 398 (4th Cir. 1991) (table), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), aff'd, 953 F.2d 639 (4th Cir. 1992) (table), gave the petitioner in *JSG Trading II* "ample notice" that commercial bribery was prohibited conduct under PACA.

Contrary to the D.C. Circuit's holding in this case, there is nothing in either *JSG Trading I* or *JSG Trading II*, or the prior commercial bribery cases cited in these cases, which could be construed as notice that payments to an undercover agent encouraged by the government in a secret criminal investigation is prohibited by PACA. This is an entirely different offense than "commercial bribery," which was carefully

defined by the D.C. Circuit in *JSG Trading I* as involving secret payments by the seller to the buyer's employee to induce the employee to continue to do business with seller.

Furthermore, such a holding conflicts with the D.C. Circuit's decisions regarding what constitutes willful conduct under §558(c) in *JSG Trading II* and *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983). As noted, the *JSG Trading II* decision made it clear there was "ample notice" that commercial bribery was prohibited conduct under PACA based on prior commercial bribery cases.

In *Finer Foods*, the licensee claimed that the violation of failing to pay for produce was not willful under §558(c) because a bank seized its assets, which were security for a loan on which the licensee had defaulted. The D.C. Circuit explained that failure to pay was explicitly prohibited by §499b(4) of PACA, and that long before the licensee had made the purchases in question, the licensee "had been fully advised of the . . . responsibilities of licensees under the Act to make full and prompt payment for its perishable agricultural commodities purchases." *Finer Foods* at 778. The D.C. Circuit further explained that the licensee entered into the transactions well after the licensee knew it was having great difficulty paying its bills. As a result, the D.C. Circuit held that the licensee's failure to pay was willful because, having been fully advised of its duty to make full prompt payment, it failed to do so "with careless disregard of statutory requirements," citing *American Fruit Purveyors*, 630 F.2d at 374. *Id.*

As to the prohibited conduct in this case, there is neither the "ample notice" of *JSG Trading II*, nor the "full advice" of *Finer Foods*, to justify a finding that Faraci's payment to the inspector was careless disregard

of statutory requirements. Unlike the requirement of full and prompt payment, explicitly stated in the Act, or the existence of prior commercial bribery cases, there is no prior notice that the conduct at issue is prohibited by the vague words of the implied duty clause of PACA. On the contrary, by engaging in its *Chevron* analysis, the D.C. Circuit concedes USDA created a new kind of prohibited conduct under §499b(4). Furthermore, the government intentionally withheld notice of the prohibited conduct in order to safeguard its criminal investigation. The conclusion follows there could be neither an intentional violation nor careless disregard of statutory requirements which had not been promulgated when the conduct occurred, and were intentionally concealed from Coosemans. Hence, this conduct was not willful under §558(c), and USDA was required to comply with §558(c) by giving notice of the prohibited conduct to petitioner before revoking its PACA license.

In deciding the conduct here was willful both USDA and the D.C. Circuit eviscerate the due process requirements of §558(c), disregard the decisions in *Finer Foods* and *JSG Trading Corp.*, and are in a conflict with the decisions of other circuits that have reviewed this question. *See Capital Produce Co. v. United States*, 930 F.2d 1077 (4th Cir. 1991) (PACA license suspension invalid where evidence of willfulness lacking and no notice to licensee that conduct violated PACA); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299 (4th Cir. 1990) (where APA notice requirement not satisfied, willfulness means intentional misdeed or gross neglect of known duty as to be equivalent thereof); *Capitol Packing Co. v. United States*, 350 F.2d 67 (10th Cir. 1965) (willfulness for purposes of §558(c) requires intentional misdeed or gross neglect of known duty to meet requirements of administrative due process).

Since most lawmaking today is accomplished by unelected agency officials, who constantly create and revise regulatory prohibitions, this decision should be reviewed to assure that the due process, which has been codified by Congress at §558(c), is preserved in administrative proceedings to the same extent as due process notice exists in other judicial proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Stephen P. McCarron
Counsel of Record

McCarron & Diess
4900 Massachusetts Avenue, N.W.
Washington, D.C. 20008
(202) 364-0400

(any footnotes trail end of each document)

No. 06-1199

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COOSEMANS SPECIALTIES, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA, RESPONDENTS

February 20, 2007, Argued

April 6, 2007, Decided

COUNSEL: Stephen P. McCarron argued the cause and filed the briefs for petitioners Coosemans Specialties, Inc. and Eddy C. Creces.

Martin Schulman argued the cause for petitioner Daniel F. Coosemans.

Stephen M. Reilly, Attorney, U.S. Department of Agriculture, argued the cause for respondents. With him on the briefs were James Michael Kelly, Deputy General Counsel, and Margaret M. Breinholt, Assistant General Counsel.

JUDGES: Before: SENTELLE, RANDOLPH and BROWN, Circuit Judges. Opinion for the Court filed by Circuit Judge SENTELLE.

OPINION BY: SENTELLE

OPINION

SENTELLE, *Circuit Judge*: Wholesale produce merchant Coosemans Specialties, Inc., petitions for review of a decision by the Secretary of the Department of Agriculture to revoke the company's license for violations of the Perishable Agricultural Commodities Act. The Secretary concluded that the company violated the Act's prohibition on unfair conduct when one of its employees bribed a Department of Agriculture inspector. In addition to revoking the company's license, the Secretary also barred two principals of the company from employment in the industry. The company and the individuals seek review of the Secretary's decision, contending that bribery does not violate the Act, and that the employment restrictions were unlawful. Because we conclude that the agency's actions were proper, we deny the petitions for review.

I.

The Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a - 499s ("PACA" or the "Act"), was enacted in 1930 to regulate interstate and foreign commerce in fresh fruits and vegetables. The Act authorizes the agency to create a system for inspecting produce. *Id.* § 499n(a). It requires merchants to obtain licenses from the Secretary of the Department of Agriculture ("USDA" or "Secretary"), and subjects licensees to a number of requirements. *Id.* §§ 499b, 499c(a), 499e, 499i. Licensees who violate the Act may find their licenses suspended or revoked, and individuals affiliated with

violators may be excluded from industry employment. *Id.* § 499h.

Petitioner Coosemans Specialties, Inc. ("CSI" or the "Company"), is a New York produce wholesaler whose PACA license was originally issued in 1986. The Company operates out of Hunts Point Terminal, a wholesale produce market in the Bronx, New York. At all times relevant to this matter, CSI had three principals, all of whom were part owners: Daniel F. Coosemans, president and founder; Eddy C. Creces, secretary, treasurer, and general manager; and Joe Faraci, vice president.

The perishable produce that arrives at Hunts Point often travels some distance between the supplier and a buyer, such as CSI. As a result, produce may arrive in a condition worse than expected. If the buyer then asks for a price reduction, the producer is at a disadvantage, because it has no way of knowing whether to trust the buyer's representations about the condition of the produce. The USDA's inspection process is intended to level the playing field by providing the faraway producer with an independent evaluation of the produce's condition so he can be assured that the price he receives is fair. A buyer, upon receipt of nonconforming goods, may request an inspection. An agency inspector reviews the produce and issues an official certificate assessing its condition that can help the producer and buyer renegotiate the price. After their transaction is complete, however, the inspection certificate is of little use in subsequent transactions. If the initial buyer is a wholesaler like CSI, it sells the produce to another buyer who is typically able to personally inspect the produce at Hunts Point.

This inspection system has been subject to abuse. For two decades, corrupt USDA inspectors and buyers at Hunts Point participated in a scheme of illegal payments. An inspector who received a bribe might furnish a falsified certificate indicating that the produce's condition was worse than it actually was. The buyer would use that certificate to negotiate a lower price with the supplier. Once he paid the supplier, the buyer could resell the produce for a price that reflected the produce's actual condition. In this way, a buyer who bribed inspectors for this purpose could increase his profit margin to the detriment of the supplier. Additionally, some inspectors who had accepted bribes permitted those companies to jump to the front of the line for inspections, thereby delaying the inspections of their competitors. Produce being perishable, buyers who had to wait for inspections were likely to receive lower prices when the goods were eventually resold.

In 1999, one of the Hunts Point inspectors, William Cashin, was caught taking bribes. After his arrest, he agreed to cooperate with investigators. He conducted inspections from April until August 1999 while wearing audio and/or video recording devices to document the bribes he received. During this period, he reported that he received fourteen bribes from Joe Faraci - CSI's vice president - both to hasten inspections and to falsify the resulting certificates in CSI's favor. Faraci was charged with eight counts of bribery of a public official, subsequently pled guilty to one count, and was imprisoned and fined. In light of these events, the Secretary filed a complaint against CSI on August 16, 2002, alleging that the Company, through Faraci's actions, had violated the implied duty clause of PACA's unfair practices provision. The Secretary also filed

complaints against Eddy Creces and Daniel Coosemans individually, alleging that they were responsibly connected to CSI at the time the violations occurred.

The Company and both individuals denied the allegations and sought agency review. The cases were consolidated and heard in late 2003 before an Administrative Law Judge, who concluded that the Company's license should be revoked and that Creces and Coosemans, as "responsibly connected" persons, should be subject to the employment restrictions. The parties appealed to the Judicial Officer ("JO"), to whom the Secretary has delegated final authority in adjudicative proceedings. *See* 7 C.F.R. § 2.35. The JO affirmed the ALJ's initial decision in a decision and order issued April 20, 2006, finding in particular that in exchange for Faraci's bribes, Cashin would "falsify" USDA inspection certificates by, *inter alia*, "increasing the percentage of defects" and "changing the temperatures of the load." *In re Coosemans Specialties, Inc.*, Dkt. No. D-02-0024, 2006 WL 1135512 (USDA). On June 13, 2006, CSI and the individual petitioners filed petitions before this Court seeking review of the Secretary's decision. CSI disputes the Secretary's interpretation of PACA's "implied duty" clause as encompassing a duty not to pay bribes. The individual petitioners challenge the Secretary's determination that they were subject to the employment restrictions as persons "responsibly connected" to CSI. The decision and order of the

JO was stayed pending our ruling.

II.

A.

When reviewing an interpretation of a statute by an agency charged with the administration of that statute, we apply the two-step *Chevron* framework. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If the meaning of the statute is unambiguous, we must give effect to the clear congressional intent. *Id.* at 842-43. If, however, the statutory language is ambiguous, we will uphold the agency's interpretation as long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. The USDA is entrusted to administer PACA, and therefore its interpretations are entitled to deference under *Chevron. See id.*

The Secretary's basis for revoking CSI's license is that the Company, through Faraci, violated the implied duty clause of PACA. That provision reads, in relevant part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . . [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction . . . or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction . . . *or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction*; or to fail to maintain the trust as required under section 499e(c) of this title. . . .7 U.S.C. § 499b(4) (emphasis added).

CSI argues that the implied duty clause cannot fairly be read to include a duty not to bribe USDA inspectors. To do so runs contrary to a number of principles of statutory interpretation. We disagree. Initially, we note that Congress's language in this subsection is extremely broad. The word "any" appears no fewer than three times in the specific clause at issue, modifying the words "undertaking," "transaction" and "duty." *Id.* The breadth and ambiguity of the key phrase as well - "any specification or duty, express or implied" - contemplates a wide range of behavior. *See G&T Terminal Packaging Co. v. Dep't of Agric.*, 468 F.3d 86, 96 (2d Cir. 2006) ("*G&T*"); *cf.* Duties of Licensees, 7 C.F.R. § 46.26 (noting that, because it is "impracticable to specify in detail all of the duties," conduct specified in the regulations is not exhaustive). Implied duties, by their nature, would not be spelled out in a contract or otherwise; they are given meaning by agency gap-filling. *See JSG Trading Corp. v. Dep't of Agric.*, 344 U.S. App. D.C. 236, 235 F.3d 608, 614 n.8 (D.C. Cir. 2001) ("*JSG Trading II*") ("Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision."), *quoted in G&T*, 468 F.3d at 96 (noting that, since the "statutory language plainly leaves undelineated what implied duties and specifications a PACA licensee might be required to bear," it is the "province of the Secretary . . . to fill in these gaps"). This is especially true if the term may be better fleshed out through application of the law to specific cases and their facts, rather than by drafting an exhaustive list of all hypothetical conduct that would constitute a violation. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999) (noting that an agency should be accorded *Chevron* deference "as it

gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication" (internal quotation omitted)); *cf. G&T*, 468 F.3d at 97 (noting that "the expansiveness" of the implied duty clause "suggests that Congress intended to grant the Secretary broad leeway to address the infinite variety of facts and circumstances that might surround a PACA violation"). In light of these considerations, we conclude that the implied duty clause is ambiguous.

We turn next to step two of *Chevron*, in which we consider whether the agency's construction is unreasonable. *See Chevron*, 467 U.S. at 842-45; 5 U.S.C. § 706(2)(A). The section in which the implied duty clause appears is labeled "unfair conduct," and begins with the language "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . . ." 7 U.S.C. § 499b. The section goes on to address specific types of dishonest or irresponsible conduct, such as failing to fulfill contract terms or misrepresenting material facts to another party. *Id.* § 499b(1)-(3), (5)-(7). The paragraph containing the implied duty clause also prohibits misrepresentations, late payments and failures to comply with other provisions of the Act designed to ensure financial responsibility of licensees. *Id.* § 499b(4). Petitioners argue that, since the paragraph and section deal with conduct between two parties to a particular transaction, the implied duty clause does not reach conduct relating to a third party, such as an inspector. Therefore, they argue, CSI's conduct toward an inspector - not another merchant - cannot form the basis for a violation of the implied duty clause or any other part of the unfair practices provision.

We and other circuits have upheld the Secretary's construction of the implied duty clause as including a prohibition on commercial bribery. In those cases, one party to a transaction violates a duty to the other party when it secretly bribes the latter's agents. Commonly, a seller bribes employees of a buyer in order to ensure that the buyer remains a customer of the seller. *See, e.g., JSG Trading II*, 235 F.3d at 610-11 (affirming the Secretary's description of "a duty of produce sellers not to corrupt agents and employees of their buyers"); *JSG Trading Corp. v. Dep't of Agric.*, 336 U.S. App. D.C. 110, 176 F.3d 536, 543 (D.C. Cir. 1999) ("*JSG Trading I*") (affirming a construction of the implied duty clause to include commercial bribery); *Sid Goodman & Co. v. Dep't of Agric.*, 945 F.2d 398 (4th Cir. 1991) (per curiam) (unpublished table decision), *available in* 1991 U.S. App. LEXIS 22951, 1991 WL 193489, at *3 (accepting as reasonable the Secretary's construction of the clause as imposing an "implied duty to deal fairly with other members in the industry," and that such duty is violated by commercial bribery); *cf. G&T*, 468 F.3d at 97 (noting that, in light of the statutory purposes, "we can hardly conceive of a duty more clearly implicated than the obligation of recipients not to make side-payments to these inspectors").

Although these cases arise under statutory law rather than the common law of contracts, the principle of contract law that requires parties to engage in honest dealing appears to have influenced how the statute was interpreted. For example, in *JSG Trading I*, we emphasized the JO's finding in *Goodman* that the payments were made without the knowledge of the employers, echoing a key factor in the mistake of fact doctrine. 176 F.3d at 542. In *Goodman* itself, the

Fourth Circuit stated that the duty extended to one's competitors, even though they were not involved in the transactions at issue. 1991 U.S. App. LEXIS 22951, [WL] 193489, at *4. The bribes were a violation of the Act because each licensee has "an implied duty to deal fairly with its competitors and by paying kickbacks, Goodman's competitors were held at an unfair advantage." *Id.*; *see also JSG Trading I*, 176 F.3d at 545 (discussing, in the context of the implied duty clause, whether the "marketplace is disturbed"); *In re Tipco, Inc.*, 953 F.2d 639 (4th Cir. 1992) (per curiam) (unpublished table decision), *available in* 1992 U.S. App. LEXIS 1166, 1992 WL 14586, at *2 (describing the duty breached by commercial bribery as, in the JO's words, a "duty of fair dealing").

The principle of honest dealing is also apparent in cases arising under the common law of contracts. For example, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 127 (2d Cir. 2003), the court reviewed the Secretary's reparation award to a party who was overcharged as a result of falsified inspection certificates that the other party had obtained by bribery. The court affirmed the award on the basis of the doctrine of mistake, holding that the seller's reliance on the integrity of USDA inspections constituted a mistake of fact that adversely affected it. It noted that the mistake resulted from the informational advantage the buyer enjoyed over the seller, and that the buyer was at fault for not informing the seller of that information. *Id.* at 128; *cf. Produce Place v. Dep't of Agric.*, 319 U.S. App. D.C. 369, 91 F.3d 173, 177 (D.C. Cir. 1996) (holding that the false or misleading statement clause in § 499b(4) was violated when the buyer knowingly misrepresented the

condition of the produce to the seller). These cases are consistent with the commercial bribery cases in concluding that one party breaches its duty of honest dealing when it seeks to benefit from concealing its illegal conduct that affected the contract price.

We similarly conclude that the Secretary's decision to construe the "implied duty" clause as imposing a duty to engage in honest dealing - which includes a duty not to bribe USDA inspectors - is reasonable. It is consistent with the purposes of the Act as understood by many courts over the years: to protect producers and other merchants from dishonest and irresponsible conduct. *See, e.g., JSG Trading I*, 176 F.3d at 538; *G&T*, 468 F.3d at 97; *Chidsey v. Guerin*, 443 F.2d 584, 587 (6th Cir. 1971); *Rankin Sales Co. v. Morrie H. Morgan Co.*, 296 F.2d 113, 116-17 (9th Cir. 1961). The Company's attempt to obtain speedier and more favorable inspections gave it an advantage over its sellers, who were improperly led to believe the inspections reflected accurate, independent analyses. We see no reason why merchants' duties under § 499b(4) should be limited to cases in which the unlawful conduct is visited directly upon the other party, rather than upon a third party who has some ability to affect the transaction. The statutory language does not limit the applicability of § 499b(4) to conduct in a transaction; rather, it extends to conduct "in connection with" a transaction. We hold that the agency's interpretation of the "implied duty" clause is reasonable.

B.

As a result of its conclusion that CSI violated PACA, the Secretary revoked the Company's license.

Petitioners advance a number of arguments why this sanction was unlawful. Generally speaking, this Court will not overturn an agency's choice of sanction unless it is "unwarranted in law" or "without justification in fact." *See Norinsberg Corp. v. Dep't of Agric.*, 310 U.S. App. D.C. 350, 47 F.3d 1224, 1227-28 (D.C. Cir. 1995) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S. Ct. 1455, 36 L. Ed. 2d 142 (1973)). As this Court recently noted, "[w]e will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates." *JSG Trading II*, 235 F.3d at 617.

When the Secretary determines that a licensee "has violated any of the provisions of section 499b," "the Secretary may . . . by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." 7 U.S.C. § 499h(a). If, as here, the violative conduct can be sanctioned in a number of different ways under the statute, the USDA may choose the appropriate sanction by "examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991).

In reviewing these factors, the USDA noted that bribery undermines PACA's remedial purpose of, *inter alia*, ensuring responsible and honest dealing by

merchants. CSI argues that the agency failed to consider the mitigating circumstance of widespread extortion by USDA agents that existed for many years. The agency did acknowledge, however, that the corruption at Hunts Point was a serious problem that the agency had been battling unsuccessfully for some time. Nonetheless, it concluded that bribery was such an egregious violation of the Act that severe penalties were warranted in order to deter such conduct. CSI's conduct not only gave it a competitive advantage, but it also increased the pressure on other merchants to engage in bribery to remain competitive. Even though the agency did not expressly describe the effect of the mitigating circumstances on its decision, its discussion of the circumstances that did impact its decision was sufficient to explain why the corruption among its inspectors did not warrant a lesser sanction. *Cf. Frank Tambone, Inc. v. Dep't of Agric.*, 311 U.S. App. D.C. 81, 50 F.3d 52, 56 (D.C. Cir. 1995) (upholding a sanction based on a decision and order that did not expressly mention the mitigating factors because the JO "adequately explained why [those factors] were insufficient to exonerate the company or to render the imposition of any sanction inappropriate"). The Secretary's decision thus rested on a reasonable construction of the statute and was consistent with its sanction policy. We have no basis on which to disturb its choice of sanction.

C.

CSI argues that, even if revocation were appropriate, the Secretary was required to give notice before imposing the sanction. The Administrative Procedure Act, 5 U.S.C. § 558(c) ("APA"), provides that, "[e]xcept

in cases of willfulness," a license may not be revoked unless the licensee has been given written notice and an "opportunity to demonstrate or achieve compliance." *Id.* In this context, "an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *Finer Foods Sales Co. v. Block*, 228 U.S. App. D.C. 205, 708 F.2d 774, 778 (D.C. Cir. 1983). The Secretary concluded that the willfulness exception applied because Faraci's conduct constituted a willful violation of PACA. We agree. Even though Faraci pled guilty to one count, the record indicates that he repeatedly made these payments over several months. The indictment to which he pled guilty states that he "willfully" and "knowingly" committed the act "with intent to influence official acts." Faraci admitted that when he made the payments he knew it was unlawful to do so. We have already held that the unlawful acts constituted a violation of PACA, and prior cases put CSI on notice of that fact. *Cf. JSG Trading II*, 235 F.3d at 617 (concluding that the Secretary's revocation of a PACA license in commercial bribery cases provided "ample notice that commercial bribes may result in revocation"). We thus hold that the Secretary's conclusion that the willfulness exception applied was supported by substantial evidence that Faraci acted with at least careless disregard of the implied duty clause. APA notice, therefore, was not necessary.

D.

The individual petitioners challenge the Secretary's determination that they were "responsibly connected" to CSI at the time of the violations. This determination means that Coosemans and Creces cannot, for a period

of time, affiliate in any way "with the business operations of a licensee, with or without compensation, including ownership or self-employment" without first obtaining permission from the Secretary. 7 U.S.C. §§ 499a(b)(10), 499h(b). "Responsibly connected" persons include those who are "affiliated or connected with a commission merchant, dealer, or broker as . . . officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation." *Id.* § 499a(b)(9). Here, both Coosemans and Creces were 33.3% owners at the beginning of the period relevant to this matter, and became 45.5% owners in July 1999. Each is also an officer, Coosemans as president and Creces as secretary and treasurer.

Although Coosemans and Creces meet the definition of "responsibly connected" persons, a 1995 amendment to the statute permits an individual who is found to be responsibly connected to demonstrate that he is "not responsible for the specific violation." H.R. REP. NO. 104-207, at 11 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 453, 458. That amendment qualified the definition of "responsibly connected" by stating that:

A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.7 U.S.C. § 499a(b)(9).

Even before Congress added this provision to the statute, this Court recognized an alter ego exception to the "responsibly connected" determination that is identical to PACA's current provision. *See Norinsberg v. Dep't of Agric.*, 333 U.S. App. D.C. 287, 162 F.3d 1194, 1199 (D.C. Cir. 1998). We held that the "alter ego" exception applied to "cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality." *Id.* at 1197 (internal quotation omitted). A petitioner who was not a true owner of such a corporation would be spared the consequences of the responsibly connected determination. The amendment enacted as section 499a(b)(9) codifies this exception. This provision is plainly not applicable here because there is no claim that CSI is an alter ego rather than a formal corporation. Petitioners are required to "demonstrate[] by a preponderance of the evidence" that they fit within the nominal or alter ego exceptions. 7 U.S.C. § 499a(b)(9). As the Secretary reasonably concluded, petitioners have failed to meet this burden. We therefore affirm the Secretary's determination that Coosemans and Creces were responsibly connected to CSI and subject to the employment restrictions.

Despite petitioners' arguments to the contrary, we can find no other reason why subjecting petitioners to the employment restrictions is contrary to congressional intent. The use of absolute language in § 499h(b) describing the scope of the employment restrictions, the broad definition of employment to include " *any* affiliation," and the inclusion of a specific exception for persons who make a certain showing - all militate against judicially created exceptions. *Id.* § 499a(b)(10) (emphasis added); *cf. Siegel v. Lyng*, 271 U.S. App. D.C.

157, 851 F.2d 412, 415-16 (D.C. Cir. 1988) (relying on the first two factors, before the provision was amended in 1995, in declining to create an exception for non-PACA job descriptions).

III. Conclusion

We conclude that the agency's interpretation of the "implied duty" clause as prohibiting bribery of a USDA inspector is reasonable, and that the "responsibly connected" determination is not arbitrary, capricious or contrary to law. We thus deny the petitions for review.

So ordered.

No. 06-1199

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COOSEMANS SPECIALTIES, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA, RESPONDENTS

JUDGES: BEFORE: Sentelle, Randolph, and Brown, Circuit Judges.

OPINION

ORDER

Upon consideration of petitioner's petition for rehearing filed May 21, 2007, it is

ORDERED that the petition be denied.

Per Curiam

No. 06-1199

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COOSEMANS SPECIALTIES, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA, RESPONDENTS

June 20, 2007, Filed

JUDGES: BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges.

OPINION

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-02-0024

In re: Coosemans Specialties, Inc.,

Respondent

And

PACA Docket No. APP-03-0002

In re:
Eddy C. Creces,

Petitioner

And

PACA Docket No. APP-03-0003

In re: Daniel F. Coosemans,

Petitioner

Decision and Order
PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a

Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory. Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151)[hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges Coosemans Specialties, Inc.: (1) during the period April 1999 through August 1999, made illegal payments to a United States Department of Agriculture inspector in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to April 1999, made illegal payments to United States Department of Agriculture inspectors on numerous occasions, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V). On October 1, 2002, Coosemans Specialties, Inc., filed an answer denying the material allegations of the Complaint and raising five affirmative defenses (Answer ¶¶ 3-6, A-E).

On January 6, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1,

1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA. On February 6, 2003, Eddy C. Creces and Daniel F. Coosemans each filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's January 6, 2003, determinations that they were responsibly connected with Coosemans Specialties, Inc.

On March 21, 2003, Administrative Law Judge Jill S. Clifton consolidated the disciplinary proceeding, *In re Coosemans Specialties, Inc.*, PACA Docket No. D-02-0024, with the two responsibly connected proceedings, *In re Eddy C. Creces*, PACA Docket No. APP-03-0002, and *In re Daniel F. Coosemans*, PACA Docket No. APP-03-0003.

On October 27-29, 2003, Administrative Law Judge Leslie B. Holt presided over a hearing in New York, New York. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Coosemans Specialties, Inc., and Eddy C. Creces. Martin Schulman, Schulman & Schulman, Woodside, New York, represented Daniel F. Coosemans. Subsequent to the hearing, Administrative Law Judge Leslie B. Holt became unavailable and the proceeding was reassigned to Administrative Law Judge Victor W. Palmer [hereinafter the ALJ]. Coosemans Specialties, Inc., and Eddy C. Creces initially moved for a new hearing, and on March 19, 2004, the ALJ issued an order granting the motion for a new hearing. Subsequently, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans waived

their right to a new hearing and requested that the ALJ render a decision based upon the October 27-29, 2003, hearing. The ALJ scheduled briefing dates and the parties completed their post-hearing briefing on May 20, 2005.

On July 13, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ: (1) concluded Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and part owner, paid bribes to a United States Department of Agriculture inspector in connection with 14 federal inspections of perishable agricultural commodities which Coosemans Specialties, Inc., purchased, received, and accepted from 13 sellers in interstate and foreign commerce; (2) concluded Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA; and (3) revoked Coosemans Specialties, Inc.'s PACA license (Initial Decision at 8, 16-17).

On October 4, 2005, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans appealed to the Judicial Officer. On October 24, 2005, the Agricultural Marketing Service and the Chief filed a response to Coosemans Specialties, Inc.'s, Eddy C. Creces', and Daniel F. Coosemans' appeal petitions. On November 7, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

Agricultural Marketing Service exhibits are designated by "CX." Coosemans Specialties, Inc.'s exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere

in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable

time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;
(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.
The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a

bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[']' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

. . . .

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section–

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

. . . .

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever–

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent–

(A) to influence any official act[.]

. . . .

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for

not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (b)(2).

DECISION

Findings of Fact

1. On March 23, 1999, the Federal Bureau of Investigation arrested William J. Cashin, a produce inspector employed by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, for taking bribes in violation of 18 U.S.C. § 201(b)(2). After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation into payments to United States Department of Agriculture inspectors by PACA licensees at the Hunts Point Terminal Market. William Cashin participated by being wired by the Federal Bureau of Investigation with audio and audio/visual equipment he then used to tape the inspections he conducted at the Hunts Point Terminal Market. At the end of each day, William Cashin gave the tapes and the bribe money he received to the Federal Bureau of Investigation and was then de-briefed by Federal Bureau of Investigation agents who prepared FBI 302 reports that identified the person paying the cash bribe, the company that employed the person paying the bribe, the type of produce inspected, and the amount of the cash payment. For his cooperation, William Cashin plead guilty to one count of bribery for which he served no

jail time and was not required to pay a fine. William Cashin was allowed to retain his future federal pension for serving as an inspector from July 1979 through August 1999, and the official reason given for his resignation from the United States Department of Agriculture was to "pursue a different career opportunity." (CX 11-CX 19; Tr. 131-37, Tr. 181.)

2. William Cashin was one of nine United States Department of Agriculture inspectors who were taking bribes for inspections they performed for Hunts Point Terminal Market wholesalers. United States Department of Agriculture supervisors assigned requested inspections so that the corrupt United States Department of Agriculture inspectors would perform the inspections for the bribe-paying wholesalers. For their participation, the United States Department of Agriculture supervisors received kickbacks. The bribery practices at the Hunts Point Terminal Market had existed for approximately 20 years when William Cashin was arrested. (Tr. 174-77, 186-87.)

3. Coosemans Specialties, Inc., is a New York corporation doing business at the Hunts Point Terminal Market with a mailing address of 249 Row B, NYC Terminal Market, Bronx, New York 10474. Coosemans Specialties, Inc., has held PACA license number 861254 since May 28, 1986, and has renewed the PACA license annually through the present. (CX 1, CX 1A; Tr. 41-42.)

4. In 1999, the three principal officers of Coosemans Specialties, Inc., were Daniel F. Coosemans, president; Eddy C. Creces, secretary and treasurer; and Joe Faraci, vice president. In 1999, Daniel F. Coosemans, Eddy C. Creces, and Joe Faraci each owned 33a percent

of the outstanding shares of stock in Coosemans Specialties, Inc., until July 1, 1999, when Joe Faraci sold most of his shares of stock to Daniel F. Coosemans and Eddy C. Creces for $150,000 and reduced his ownership share to 9 percent. (CX 1 at 11, CX 4 at 1; Tr. 507.)

5. Since 1994, William Cashin dealt with Joe Faraci whenever Coosemans Specialties, Inc., requested an inspection of perishable agricultural commodities. Joe Faraci regularly made illegal payments of $50 to William Cashin for each inspection he performed from 1994 through 1999. In exchange for the $50 payments, William Cashin would "help" Coosemans Specialties, Inc., when needed, by preparing United States Department of Agriculture inspection certificates that he would falsify by (1) increasing the percentage of defects, (2) increasing the number of containers inspected, or (3) changing the temperatures of the load. William Cashin gave such "help" on 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr. 124-30.)

6. After becoming a participant in the investigation conducted by the Federal Bureau of Investigation, William Cashin conducted 14 inspections in 1999 for Coosemans Specialties, Inc., for which Joe Faraci paid him $60 for one inspection and $50 for each of the others. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged Joe Faraci with eight counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment charges that Joe Faraci:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:
>
> COUNT/ DATE/ AMOUNT OF BRIBE
> ONE 4/1/99 $60
> TWO 5/11/99 $350
> THREE 5/20/99 $150
> FOUR 5/26/99 $50
> FIVE 7/26/99 $200
> SIX 8/2/99 $50
> SEVEN 8/4/99 $50
> EIGHT 8/12/99 $50
> (Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 7 at 1-2.

The bribes charged in the indictment cover the payments Joe Faraci made to William Cashin in connection with the 14 inspections of perishable agricultural commodities identified in Finding of Fact 8 (CX 11-CX 18).

7. Joe Faraci was arrested on October 27, 1999. On June 22, 2001, Joe Faraci pled guilty to count one of the indictment that alleged his payment of a bribe on April

1, 1999, at Coosemans Specialties, Inc.'s Hunts Point place of business. Joe Faraci was sentenced to 15 months in prison, 3 years of supervised release, and a $4,000 fine. Joe Faraci was also ordered to make restitution to victims pursuant to PACA proceedings.

(CX 8.)

8. William Cashin testified that, in 1999, Joe Faraci paid him bribes in respect to 14 inspections of produce performed for Coosemans Specialties, Inc. There was no contradicting testimony. William Cashin's testimony, combined with the eight-count indictment filed against Joe Faraci, the FBI 302 reports, and the contemporaneous United States Department of Agriculture inspection certificates William Cashin prepared, establish that Joe Faraci paid bribes to William Cashin on behalf of Coosemans Specialties, Inc., in respect to the following 14 inspections William Cashin performed:

Inspection 1

On April 1, 1999, William Cashin performed one inspection of garlic at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $60 (CX 11).

Inspections 2 and 3

On May 11, 1999, William Cashin performed two inspections (one of mangoes and one of plantains) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $350 that included bribe money for five prior inspections (CX 12).

Inspections 4, 5, and 6

On May 17, 1999, William Cashin performed three inspections (one of snow peas and sugar snap peas, one of Haitian mangoes, and one of sweet peppers) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $150 (CX 13).

Inspection 7

On May 26, 1999, William Cashin performed one inspection of a load of radicchio at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 14).

Inspections 8, 9, 10, and 11

On July 23, 1999, William Cashin performed four inspections (one of radicchio, one of tomatoes, one of plum tomatoes, and one of mesculin) at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $200 (CX 15).

Inspection 12

On August 2, 1999, William Cashin performed one inspection of sweet peppers at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 16).

Inspection 13

On August 2 or 3, 1999, William Cashin performed one inspection of tomatoes at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 17).

Inspection 14

On August 12, 1999, William Cashin performed one inspection of asparagus at Coosemans Specialties, Inc., for which Joe Faraci paid him a bribe of $50 (CX 18).

9. Coosemans Specialties, Inc., employs at its Hunts Point Terminal Market facilities approximately 40 people. Twenty-five of its employees are porters who load and unload produce and perform other warehouse duties. Eight or nine of Coosemans Specialties, Inc.'s employees are office workers and five are salespeople. (Tr. 428.)

10. There are 52 merchants at the Hunts Point Terminal Market. In comparison to the others, Coosemans Specialties, Inc., is medium-sized. Coosemans Specialties, Inc., owns four Hunts Point Terminal Market warehouse units and receives about 100 lots of produce on each of the 5 days per week it operates. Coosemans Specialties, Inc.'s 2002 gross revenue was just over $24,000,000 with an annual payroll of $2,100,000. (Tr. 427-29, 434.)

11. Daniel F. Coosemans, who principally resides in Miami, Florida, and Panama, came to the United States in the 1980's to introduce a marketing concept he started in Belgium for franchising the specialty fruit and vegetable business. He started his first company in Belgium. He then started businesses on a partnership basis in the United States. His method has been to identify a market, then start a new company in that market, and then find a partner who would run the company allowing Daniel F. Coosemans to start other companies elsewhere. Daniel F. Cooseman's first United States company was started in Los Angeles,

California. He located his second company, which Eddy C. Creces runs for him, at the Hunts Point Terminal Market in New York. There are now 27 such companies around the world and 20 of them are in the United States.

After he set up these companies, Daniel F. Coosemans' involvement with each of them has been to be its financing entity and to check its monthly statements to determine whether it is achieving the profits he believes to be appropriate. Altogether Daniel F. Coosemans' companies have 550 employees in the United States with overall weekly revenues in the tens of thousands. (Tr. 619-29.)

Discussion

Coosemans Specialties, Inc., Violated the PACA When Joe Faraci Paid Bribes to a United States Department of Agriculture Inspector

The record establishes that Joe Faraci, Coosemans Specialties, Inc.'s vice president, director, and partial owner during 1999, paid bribes to a United States Department of Agriculture produce inspector in respect to 14 inspections of perishable agricultural commodities performed at Coosemans Specialties, Inc.'s request. The United States Department of Agriculture produce inspector who received the bribes so testified. Joe Faraci, who was charged with eight counts of bribing a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Coosemans Specialties, Inc., and pled guilty to one count of the indictment, was not called to testify.

Section 16 of the PACA (7 U.S.C. § 499p) provides that the act, omission, or failure of any agent, officer, or any other person acting for, or employed by, any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker. Officers and owners of a PACA licensee, other than the bribing officer or owner need not have actual knowledge of the illegal payments by one officer or agent, for the PACA licensee to be held to have committed knowing and willful violations of the PACA.[1]

Coosemans Specialties, Inc., argues that the payment of a bribe to a United States Department of Agriculture inspector, though a reprehensible violation of other federal laws, is not a violation of the PACA. Even though *In re Post & Taback, Inc.*, has held otherwise, Coosemans Specialties, Inc., contends the case was wrongly decided and overstates the goals of the PACA.

Coosemans Specialties, Inc.'s argument is unpersuasive. First, *In re Post & Taback, Inc.*, as affirmed by the United States Court of Appeals for the District of Columbia Circuit, is binding in this proceeding. Second, Coosemans Specialties, Inc.'s premises are flawed.

Coosemans Specialties, Inc., argues that violations of the PACA are limited to "regulating conduct of licensees towards other merchants which results in some financial detriment on a specific transaction" (Brief of Respondent and Petitioner Creces at 21).

Coosemans Specialties, Inc., further asserts the code of fair dealing between produce merchants, which the PACA was enacted to establish, was not violated by Joe Faraci's payments to a United States Department of Agriculture produce inspector (Brief of Respondent and Petitioner Creces at 22).

To support these propositions, Coosemans Specialties, Inc., contends Joe Faraci's payments to William Cashin were really nothing more than tips for prompt service. However, the only evidence as to the reason for the payments is the testimony of the United States Department of Agriculture produce inspector that he was being paid bribes to "help" Coosemans Specialties, Inc., with the inspections. The person who actually paid the bribes did not testify to contradict the United States Department of Agriculture inspector. Coosemans Specialties, Inc., can only point to the statement by Joe Faraci at the time he pled guilty to bribing a United States Department of Agriculture produce inspector that he paid the bribes in order to obtain prompt United States Department of Agriculture inspections, as follows:

> [THE COURT:]
> Q. All right, Mr. Faraci, before I accept your plea, I have to be satisfied that you are in fact guilty of the charge to which you have just pleaded guilty. So tell me in your own words what it is you did that makes you guilty of this charge.
> [MR. FARACI:]
> A. Whenever we need an inspection I gave or I asked to insure them to come faster, I gave them

a $50 gift. This way they will come faster to do the inspection.
Q. You gave --
A. The inspector, William Cashin.
Q. Excuse me?
A. I gave William Cashin $50 to come quicker to do the inspection.
Q. And this was to do inspection of produce?
A. Yes.
Q. And this occurred at the Hunts Point Terminal Market?
A. Yes.
Q. On approximately how many occasions did you give him money to do these inspections?
MR. MORIARTY: May I interrupt for a half moment your Honor?
THE COURT: Sure.
MR. MORIARTY: Your Honor, under the terms discussed with the government, Mr. Faraci is prepared to admit that to each count of the indictment, to each inspection within that indictment that he had paid the $50 for the same conduct as just elicited concerning Count 1.
THE COURT: There was a total indictment then of $960.
MR. MORIARTY: I think that is correct.
Q. Did you pay $960 to this inspector as is alleged in the indictment?
A. Yes.
Q. And did you know it was illegal to do so at the time you did it?
A. Yes, your Honor..22
Q. And did this occur in the year of '99?
A. Yes.

RX 15 at 14-15.

However, Joe Faraci's statement that he only paid bribes in order to obtain prompt inspections of perishable agricultural commodities was a self-serving statement designed to de-emphasize the seriousness of his crime and possibly reduce his sentence. Joe Faraci's statement made during his allocution was contrary to his admission when he pled guilty to count one of the indictment that specified, as follows:

> JOE FARACI, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Cooseman Specialties, Inc., Hunts Point Terminal Market, Bronx, New York.

CX 7 at 1.

In addition to Joe Faraci's admission, William Cashin identified the ways in which he would falsify United States Department of Agriculture inspection certificates to "help" Coosemans Specialties, Inc., in respect to 75 percent to 80 percent of the inspections he conducted for Coosemans Specialties, Inc. (Tr.130). Even if there were contradicting, credible evidence showing that Coosemans Specialties, Inc.'s bribes were not given to influence the outcome of the inspections, Coosemans Specialties, Inc.'s bribing a United States Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive advantage over its shippers who supplied it with produce. Coosemans

Specialties, Inc., also gained an unfair advantage over competing wholesalers.

The PACA is designed to protect producers of perishable agricultural products who in many instances send their products to a buyer or commission merchant who is thousands of miles away. PACA was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.[2]

The PACA seeks to bring about fair dealing between members of the produce industry who conduct interstate and foreign commerce long-distance, where shipments must move quickly to avoid losses caused by rot and decay. When the receiver tells the shipper that the value of the shipment has been lowered because of rot and decay, the distant out-of-state or foreign shipper has only the receiver's word as verified by a United States Department of Agriculture inspection certificate. A United States Department of Agriculture inspection certificate that supports the receiver's claim that the produce has deteriorated can cause a shipper to accept a lower than anticipated price. A United States Department of Agriculture inspection certificate can also induce the shipper to continue to deal with the receiver in the future since a United States Department of Agriculture inspection certificate that supports the receiver's evaluation of the condition of perishable agricultural commodities on receipt makes the receiver appear to be reliable and trustworthy. Therefore, Coosemans Specialties, Inc.'s bribery of a United States. Department of Agriculture inspector gave Coosemans Specialties, Inc., an unfair competitive

advantage over the shippers and growers who supplied Coosemans Specialties, Inc., with produce as well as over competing wholesalers.

Even if the bribed inspector never falsified any United States Department of Agriculture inspection certificates, Coosemans Specialties, Inc.'s illegal payments to a United States Department of Agriculture inspector, standing alone, violated the PACA. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for a PACA licensee in connection with any transaction involving any perishable agricultural commodity, which is received in interstate or foreign commerce to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with the transaction.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123 (2d Cir. 2003), upheld a reparation award rendered in favor of a shipper who accepted reduced prices from a receiver based on inspections by three of the United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were convicted of accepting bribes. The Judicial Officer made a finding in the case that there was no showing that falsified inspections were issued as to the produce, but that nevertheless all of the price adjustments were voidable because of the shipper's mistake and the receiver's misrepresentation regarding the integrity of the inspection process. The United States Court of Appeals for the Second Circuit, in affirming the Judicial Officer, stated:

> It is clear that, when the parties agreed to the price adjustments, DiMare [the shipper] was mistaken as to both whether Koam [the receiver] had paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted the bribes.
>
> . . . .
>
> Koam's fault obviously caused DiMare's mistake, as Koam knew that its employee had bribed USDA inspectors, yet Koam neglected to inform DiMare of this fact. In addition, in light of Koam's involvement in bribery (as demonstrated by [its employee] Friedman's guilty plea), it would be unconscionable to enforce the price-adjustment agreements, which resulted from the work of inspectors who had accepted bribes.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127-28 (2d Cir. 2003).

As was the case in *Koam*, when Coosemans Specialties, Inc., paid bribes in respect to inspections without informing the shippers, Coosemans Specialties, Inc., violated its duty to inform the shippers of that fact. Coosemans Specialties, Inc.'s duty to inform shippers of the bribes it pays is found in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and its failure to inform the shipper each time a bribe was paid in respect to an inspection of perishable agricultural commodities was a separate violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Coosemans Specialties, Inc., paid bribes in connection with 14 inspections of perishable agricultural

commodities in 1999. Coosemans Specialties, Inc.'s PACA violations were therefore repeated.3 Coosemans Specialties, Inc.'s violations were also flagrant and willful.[4] Accordingly, I conclude Coosemans Specialties, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

PACA License Revocation is the Appropriate Disciplinary Sanction

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.[5]

Both Eddy C. Creces and Daniel F. Coosemans request, if Coosemans Specialties, Inc., is found to have violated the PACA, that I assess Coosemans Specialties, Inc., a civil penalty. They so request because, if they are determined to be "responsibly connected" to a PACA licensee that has had its license revoked, each will be barred from employment by PACA licensees for 1 year, and after 1 year, employment shall be conditioned upon the posting of a surety bond acceptable to the Secretary of Agriculture.[6].

Bribery is such an egregious violation of the PACA that the only appropriate sanction is one that will deter Coosemans Specialties, Inc., and other PACA licensees

from paying bribes to United States Department of Agriculture inspectors in the future.

Daniel F. Coosemans also argues that the restrictions that revocation will place upon his participation in the activities of the 20 other PACA licensed companies in which he has an ownership interest is excessive and a consequence never intended by Congress. However, the language of the PACA is clear and unambiguous. If the PACA requires amendment, the amendments must come from Congress and may not be made here.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate disciplinary sanction. My views accord with those of John Koller, the administrative official who testified at the hearing (Tr. 549-54).

John Koller stated that approximately 150,000 produce inspections are performed each year and if there is any suspicion that the inspections are tainted in any way, the entire industry is affected. Inasmuch as United States Department of Agriculture.

inspection certificates are used to resolve hundreds of disputes each day, the objectivity of the United States Department of Agriculture inspector should not be compromised by payments he or she receives from wholesalers nor should other wholesalers be made to feel that they too should make such payments in order to be competitive. The Agricultural Marketing Service recommends PACA license revocation to deter Coosemans Specialties, Inc., and any future potential violators from making illegal payments to United States Department of Agriculture produce inspectors. The recommendation is consistent with prior case law.[7] Accordingly, Coosemans Specialties, Inc.'s PACA license should be revoked.

Eddy C. Creces and Daniel F. Coosemans Were Responsibly Connected with Coosemans Specialties, Inc.

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[8] The record establishes that, in 1999, Eddy C. Creces was the secretary, the treasurer, and a holder of 33a percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Eddy C. Creces increased the percentage of outstanding stock which he owned to 45½ percent.

The record also establishes that, in 1999, Daniel F. Coosemans was the president and a holder of 33a percent outstanding stock of Coosemans Specialties, Inc. On July 1, 1999, Daniel F. Coosemans increased the percentage of outstanding stock which he owned to 45½ percent. The burden is on Eddy C. Creces and Daniel F. Coosemans to demonstrate by a preponderance of the evidence that they were not responsibly connected with Coosemans Specialties, Inc., despite their positions at, and ownership of, Coosemans Specialties, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Neither Eddy C. Creces nor Daniel F. Coosemans proved by a preponderance of the evidence that he was merely a nominal officer or a nominal shareholder of Coosemans Specialties, Inc., when Coosemans Specialties, Inc., violated the PACA.

Nonetheless, Eddy C. Creces argues he should not be found to be responsibly connected with the Coosemans Specialties, Inc., because he did not willfully commit the bribery violations. But the payment of bribes by an employee of a PACA licensee is a willful violation of the PACA.[9]

Eddy C. Creces further argues that a determination of responsible connection would deprive him of his property, specifically his stock ownership, without due process in violation of the Fifth Amendment to the Constitution of the United States. A similar argument was advanced and rejected in *Zwick v. Freeman*, 373 F.2d 110, 118-19 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). *Zwick* was followed and other constitutional objections to the employment bar provisions of the PACA were raised and rejected in *Bama Tomato Co. v. United States Dep't of Agric.*, 112 F.3d 1542, 1546-47 (11th Cir. 1997).

Daniel F. Coosemans similarly argues that the application of the employment bar provisions to him constitutes a denial of his constitutional rights. He cites in support of his argument various cases concerning constitutional restrictions on governmental regulation of other trades and professions. However, the cited cases are inapposite. *Zwick* and *Bama Tomato Co.* considered such arguments in the specific context of the PACA's employment bar provisions and found the arguments unavailing. Therefore, the argument that the PACA employment bar provisions are unconstitutional is again rejected as contrary to applicable case law.

For the foregoing reasons, I affirm the Chief's January 6, 2003, determinations that Eddy C. Creces and Daniel F. Coosemans were responsibly connected with Coosemans Specialties, Inc., during the period April 1, 1999, through August 12, 1999, when Coosemans Specialties, Inc., violated the PACA.

Appeal Petitions

Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans raise eight issues in Brief of Appellant-Petitioner Daniel F. Coosemans [hereinafter Appeal Petition of Daniel F. Coosemans] and Appeal Petition of Respondent and Petitioner Creces. First, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's conclusion that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture produce inspector in connection with inspections of perishable agricultural commodities constitute violations of the PACA, is error. Coosemans Specialties, Inc., and Eddy C. Creces assert the Agricultural Marketing Service did not allege that Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or wholesalers and the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc. (Appeal Pet. of Respondent and Petitioner Creces at 5-8.).

I disagree with Coosemans Specialties, Inc.'s and Eddy C. Creces' contentions that a violation of section 2(4) of

the PACA (7 U.S.C. § 499b(4)) may only be shown if Coosemans Specialties, Inc.'s payments to William Cashin were designed to gain an unfair competitive advantage over shippers or other wholesalers and that the Agricultural Marketing Service did not prove that William Cashin falsified any United States Department of Agriculture inspection certificates issued in connection with the inspection of perishable agricultural commodities for Coosemans Specialties, Inc.

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.[10]

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and

consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and bribes to United States Department of Agriculture produce inspectors.[11]

Second, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's finding that Coosemans Specialties, Inc.'s payments to a United States Department of Agriculture inspector are willful, is error. Coosemans Specialties, Inc., and Eddy C. Creces argue that, since Coosemans Specialties, Inc.'s violations were not willful, the ALJ erred by failing to dismiss the Complaint because the Agricultural Marketing Service did not comply with the notice and opportunity to demonstrate or achieve compliance

provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)). (Appeal Pet. Of Respondent and Petitioner Creces at 7.)

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

> **§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**
>
> ....
>
> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given–
>
> (1) notice by the agency in writing of the facts or onduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

A violation is willful if, irrespective of evil motive or erroneous advice, a person
intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.[12] The record clearly establishes that Joe Faraci intentionally made unlawful payments to William Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the notice and opportunity to demonstrate or achieve compliance provisions in the Administrative Procedure Act (5 U.S.C. § 558(c)) are not applicable to this proceeding.

Third, Coosemans Specialties, Inc., Eddy C. Creces, and Daniel F. Coosemans contend the ALJ's finding that William Cashin falsified United States Department of Agriculture inspection certificates, is error (Appeal Pet. of Respondent and Petitioner Creces at 8-12; Appeal Pet. of Daniel F. Coosemans at 7-8).

Even if I were to find William Cashin's testimony lacked credibility and insufficient evidence to establish that William Cashin falsified any of the United States Department of Agriculture inspection certificates he provided to Coosemans Specialties, Inc., those findings would not change the disposition of this proceeding. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States

Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities, even if the payment does not result in a United States Department of Agriculture inspector's falsification of a United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities and bribes to United States Department of Agriculture produce inspectors.[13]

Fourth, Coosemans Specialties, Inc., and Eddy C. Creces contend the ALJ's failure to impose a civil money penalty, is error (Appeal Pet. of Respondent and Petitioner Creces at 13-16).

I find Joe Faraci's payment of bribes to a United States Department of Agriculture produce inspector within the scope of his employment are deemed to be the actions of Coosemans Specialties, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. Bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary to deter Coosemans Specialties, Inc., from future similar violations of the PACA and to deter other PACA licensees from similar violations of the PACA. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal